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1 any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a
2 claim upon which relief may be granted or seek monetary relief from a defendant who is
3 immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be
4 liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
5 1988).

6 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
7 elements: (1) that a right secured by the Constitution or laws of the United States was
8 violated, and (2) that the alleged violation was committed by a person acting under the
9 color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

10 **B. Plaintiff's Claims**

11 Plaintiff claims that his Eighth Amendment right against cruel and unusual
12 punishment was violated when CTF officials denied him adequate clothing, access to
13 showers and outdoor exercise from November 20, 2007 to August 15, 2008 while on a
14 lockdown program. (Pet. 5-6.) Liberally construed, Plaintiff presents a cognizable claim
15 under § 1983. See Farmer v. Brennan, 511 U.S. 825, 832 (1994).

16 Defendant "Clothing Manager" is dismissed from the complaint without prejudice
17 until Plaintiff identifies this individual by name through discovery at which point he may
18 seek leave to amend to add the named defendant as a party to this action. See Gillespie v.
19 Civiletti, 629 F.2d 637, 642 (9th Cir. 1980)

20 **C. Request to Amend**

21 Plaintiff requests to amend his complaint to add a claim that Defendants are
22 forcing him to be double-celled. (Docket No. 5.) Plaintiff admits in the attached
23 proposed amended complaint that the inmate appeal grieving this claim was "screened
24 out" at the first level. (Id. at 2.)

25 The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321
26 (1996) ("PLRA") provides: "No action shall be brought with respect to prison conditions
27 under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail,
28 prison, or other correctional facility until such administrative remedies as are available

1 are exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is mandatory and not left to the
2 discretion of the district court. Woodford v. Ngo, 548 U.S. 81, 84 (2006). Exhaustion is
3 a prerequisite to all prisoner lawsuits concerning prison life, whether such actions involve
4 general conditions or particular episodes, whether they allege excessive force or some
5 other wrong, and even if they seek relief not available in grievance proceedings, such as
6 money damages. Porter v. Nussle, 534 U.S. 516, 524 (2002). The exhaustion
7 requirement requires “proper exhaustion” of all available administrative remedies. Ngo,
8 548 U.S. at 93. Because exhaustion under § 1997e(a) is an affirmative defense, a
9 complaint may be dismissed for failure to exhaust only if failure to exhaust is obvious
10 from the face of the complaint and/or any attached exhibits. Wyatt v. Terhune, 315 F.3d
11 1108, 1119-20 (9th Cir. 2003). The Court may dismiss a complaint for failure to exhaust
12 where the prisoner “conce[des] to nonexhaustion” and “no exception to exhaustion
13 applies.” Id. at 1120. Here, Plaintiff concedes in his proposed amended complaint that
14 he has not exhausted his administrative remedies, (Docket No. 5 at 2), and no exception
15 to exhaustion is alleged or apparent in the complaint. He states that the “issue was
16 presented responsibly to the appeals dept. but due to the complexity of the problem the
17 appeals coordinator screened it out.” (Id.) According to the “Screening at the FIRST
18 Level” notice, the appeal was screened out for the following: “This appeal constitutes an
19 abuse of the appeal process pursuant to CCR 3084.4. Your appeal cannot be understood
20 or is obscured by pointless verbiage or voluminous unrelated documentation CCR
21 3084(c).” (Id., Ex. A.) This does not excuse the PLRA’s requirement of “proper
22 exhaustion” under Ngo: “Proper exhaustion demands compliance with an agency’s
23 deadlines and other critical procedural rules because no adjudicative system can function
24 effectively without imposing some orderly structure on the course of its proceedings.”
25 548 U.S. at 90-91 (footnote omitted).

26 Furthermore, if the Court permitted the amendment, the result would be a mixed
27 complaint, *i.e.*, a complaint with both exhausted and unexhausted claims. Then the Court
28 would simply dismiss this unexhausted claim, which is not intertwined with the properly

1 exhausted claims, and proceed only with the exhausted claims. See Lira v. Herrera, 427
2 F.3d 1164, 1175-76 (9th Cir. 2005). To avoid the unnecessary delay this would cause,
3 Plaintiff's motion to amend is DENIED. Plaintiff may pursue this claim in a separate
4 action after he has properly exhausted all his administrative remedies.

6 CONCLUSION

7 For the reasons stated above, the Court orders as follows:

8 1. Defendant "Clothing Manager" is DISMISSED without prejudice from this
9 action. The clerk shall terminate this defendant from the docket.

10 2. The Clerk of the Court shall issue summons and the United States Marshal
11 shall serve, without prepayment of fees, a copy of the complaint in this matter, all
12 attachments thereto, and a copy of this order upon **Warden Ben Curry and**
13 **Correctional Officer Deverick, and at Correctional Training Facility - Soledad.** The
14 Clerk shall also mail courtesy copies of the Complaint and this order to the California
15 Attorney General's Office.

16 3. No later than **sixty (60) days** from the date of this order, Defendants shall
17 file a motion for summary judgment or other dispositive motion with respect to the claims
18 in the complaint found to be cognizable above, or, within such time, notify the Court that
19 Defendants are of the opinion that this case cannot be resolved by such a motion.

20 a. If Defendants elect to file a motion to dismiss on the grounds that
21 Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C.
22 § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion pursuant to
23 Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v.
24 Terhune, 540 U.S. 810 (2003).

25 b. Any motion for summary judgment shall be supported by adequate
26 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
27 Civil Procedure. **Defendants are advised that summary judgment cannot be granted,**
28 **nor qualified immunity found, if material facts are in dispute. If any Defendant is of**

the opinion that this case cannot be resolved by summary judgment, he shall so inform the Court prior to the date the summary judgment motion is due.

4. Plaintiff's opposition to the dispositive motion shall be filed with the Court and served on Defendants no later than **thirty (30) days** from the date Defendants' motion is filed.

a. In the event Defendants file an unenumerated motion to dismiss under Rule 12(b), Plaintiff is hereby cautioned as follows:¹

The Defendants have made a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the ground you have not exhausted your administrative remedies. The motion will, if granted, result in the dismissal of your case. When a party you are suing makes a motion to dismiss for failure to exhaust, and that motion is properly supported by declarations (or other sworn testimony) and/or documents, you may not simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or documents, that contradict the facts shown in the Defendant's declarations and documents and show that you have in fact exhausted your claims. If you do not submit your own evidence in opposition, the motion to dismiss, if appropriate, may be granted and the case dismissed.

b. In the event Defendants file a motion for summary judgment, the Ninth Circuit has held that the following notice should be given to Plaintiffs:

The defendants have made a motion for summary judgment by which they seek to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendants' declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted

¹ The following notice is adapted from the summary judgment notice to be given to pro se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 in favor of defendants, your case will be dismissed and there will be no
2 trial.

3 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to
4 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477
5 U.S. 317 (1986) (holding party opposing summary judgment must come forward with
6 evidence showing triable issues of material fact on every essential element of his claim).
7 Plaintiff is cautioned that failure to file an opposition to Defendants' motion for summary
8 judgment may be deemed to be a consent by Plaintiff to the granting of the motion, and
9 granting of judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52,
10 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

11 5. Defendants shall file a reply brief no later than **fifteen (15) days** after
12 Plaintiff's opposition is filed.

13 6. The motion shall be deemed submitted as of the date the reply brief is due.
14 No hearing will be held on the motion unless the Court so orders at a later date.

15 7. All communications by the Plaintiff with the Court must be served on
16 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true
17 copy of the document to Defendants or Defendants' counsel.

18 8. Discovery may be taken in accordance with the Federal Rules of Civil
19 Procedure. No further Court order is required before the parties may conduct discovery.

20 9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
21 Court informed of any change of address and must comply with the Court's orders in a
22 timely fashion. Failure to do so may result in the dismissal of this action for failure to
23 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

24 IT IS SO ORDERED.

25 DATED: 4/20/09

26 
27 JEREMY FOGEL
28 United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JEFFREY ROAM,

Plaintiff,

v.

BEN CURRY, et al.,

Defendants.

Case Number: CV08-05528 JF

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 5/11/09, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Jeffrey Wayne Roam C-80656
C.T.F. Central
D Wing 235
P.O. Box 689
Soledad, CA 93960

Dated: 5/11/09

Richard W. Wieking, Clerk